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24 September 1956

OGC Has Reviewed

MEMORANDUM FOR: Recipients of OGC Opinions

SUBJECT : Published Opinions, Group 4

1. Enclosed is the fourth group of opinions to be published by the Office of General Counsel.

2. In addition to fifteen General Counsel opinions there are included eleven decisions of the Comptroller General of the United States directed to the Agency. It is suggested that the Comptroller General decisions be kept together in chronological order in your file or book containing your copies of OGC opinions.

3. This distribution completes publication of General Counsel opinions of previous years which are at this time considered to be of particular interest to Agency components. General Counsel opinion 53-5 may be distributed at a later date.

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4. Comments or requests for clarification of opinions should be addressed to [redacted] Extension 621.

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[redacted]

LAWRENCE R. HOUSTON
General Counsel

WHEN ENCLOSURES ARE DETACHED, THIS MEMORANDUM MAY BE DOWNGRADED TO UNCLASSIFIED.

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GENERAL COUNSEL'S OPINION NUMBER 54-7, DATED 17 MAY 1954

Annual leave may be adjusted retroactively to leave without pay.

TO DEPUTY CHIEF, FINANCE DIVISION

1. Memoranda from EE/Admin and DD/P-Admin have questioned whether or not annual leave which has already been taken as annual leave may be converted into leave without pay at some subsequent date.

2. There is no clear-cut statutory definition or discussion of leave without pay. The conception of LWOP has become a part of Government administration through custom and usage. The Civil Service Commission and the Federal Personnel Council have considered this subject, and the Federal Personnel Manual, on Page L1-9, provides "the authorization of leave without pay is a matter of administrative discretion." Further, the Federal Personnel Manual furnishes a set of standards with reference to which the administrative discretion should be exercised. Those standards are described by the manual as being nonregulatory in character and not mandatory. The manual provides in part as follows:

> "Each request for leave without pay should be examined closely to assure that the value to the Government or the serious needs of the employee are sufficient to offset the costs and administrative inconveniences to the Government which result from the retention of an employee in a leave-without-pay status."

3. No statute has been found which prohibits the retroactive adjustment of annual leave taken by an employee to leave without pay provided the appropriate refunds are made. The regulations of the Agency authorized Chiefs of Mission to grant leave without pay, and in the absence of any statutory or regulatory provisions prohibiting retroactive conversion of leave, this office sees no legal objection to such action as was taken.

4. The previous opinion of this office, dated 22 March 1954, pointed out such regulations and laws as seemed to bear on the problem. That opinion went further to indicate that the policy proscribing retroactive conversions appeared to be a sound one in view of all of the factors concerned. However, we should like to make it clear that the determination to approve retroactive conversions is an administrative

one to which this office can interpose no legal objection in the absence of an Agency policy expressed in regulations limiting such administrative discretion.

[redacted]

LAWRENCE R. HOUSTON
General Counsel

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SECRET

GENERAL COUNSEL'S OPINION NUMBER 53-11, DATED 1 DECEMBER 1953

There is no legal objection to purchase or sales transactions between the Government and its employees provided such transactions are of a normal "arms length" character.

TO THE CHIEF OF ADMINISTRATION, DD/P

1. This will acknowledge receipt of a memorandum from the Chief, FE, dated 16 November 1953, which you forwarded to this office for comment on the legality of the procedure proposed therein.

2. The FE memorandum outlines the case of a Mr. S. who is shortly to return to the United States and who has offered to sell his household effects in B. to the Agency for $700. The memorandum reports the opinion of the Chief of Station that the price offered by Mr. S. is an exceptionally good one, especially in view of the fact that the Agency would otherwise be required to ship the furniture back to the United States and purchase additional furniture for the next occupant of Mr. S.'s quarters. You specifically ask if there is any legal way to permit purchases of this kind.

3. Although there may be said to be a Government policy against engaging in purchases or sales from or to Government employees, there is no legal objection to such transactions provided they are of a normal "arms length" character. This office, therefore, perceives no objection to the purchase of Mr. S.'s furniture by the Agency, provided the price is, in fact, a good one, that the purchase is made by the officials normally required to conduct such affairs, and that every effort is made to ensure adequate documentation and inclusion in the property records of the Agency.

[redacted]

LAWRENCE R. HOUSTON
General Counsel

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CONFIDENTIAL

GENERAL COUNSEL'S OPINION NUMBER 53-10, DATED 19 OCTOBER 1953

There is no objection to a Government employee performing services for compensation for a private employer if the services are in no way connected with the official duties of the employee.

TO COLONEL H. G. S.

1. Colonel S. asked whether he may properly receive a fee or per diem compensation for commenting upon a study now being produced at Georgetown University under a contract with the United States Air Force. It is my understanding that he is at present a member of the United States Army detailed to this Agency. It is my further understanding that the officials of the Army and of the Security Office of this Agency have indicated no objection to his performing this service.

2. The Comptroller General has stated in 16 Comp. Gen. 127:

> "Manifestly it is contrary to public policy, if not prohibited by statute, for any Federal, State, or county official to enter into private arrangements with either a private or a public corporation whereby such official is to receive 'extra' payments, not authorized by law, for official services rendered by him either during or outside of regular office hours."

The Comptroller General has also stated in 20 Comp. Gen. 488, 489:

> "There is known no law or regulation prohibiting payment of the compensation of a Federal position to the incumbent thereof for a period of authorized annual leave of absence with pay solely because the employee during such period worked for, and received compensation from, a private employer, even though the private employer was engaged on work under a contract with the Government, provided the salary in the private employment does not constitute a contribution toward the Federal salary in contravention of the act of March 3, 1917, 39 Stat. 1106 (5 U.S.C. 66)."

CONFIDENTIAL

3. The conclusion appears to be that there is no objection to an arrangement between Colonel S. and a private corporation, whereby he will perform and be paid for services in no way connected with his official duties and which he performs outside of Government hours or while on annual leave, so long as such services are not clearly inconsistent with his official duties.

[redacted]

LAWRENCE R. HOUSTON
General Counsel

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b. A staff employee covert trainee is injured in the course of training. Upon recovery from the temporary disability, a broken arm or leg, etc., he is to be assigned on a sensitive project. Upon proper determination that the classified procedures for submission to BEC are not sufficient protection for intended utilization, the case might be processed in accordance with paragraph a.

c. An employee has a mental breakdown, either stateside or overseas. If overseas, authority is contained in 5(a)(5)(C) to pay the expenses of treatment at the nearest suitable hospital in order to relieve the financial burden on the employee. However, in a case of this type, Agency interest and application of other authorities might be mandated, at least in those cases where it is evident that the patient must be placed in the hands of cleared medical persons to assist in salvaging a highly trained individual for future utilization by the Agency, or in a hospital where the effect of possible disclosure of classified information would be to a large extent nullified.

Finding

19. In accordance with the foregoing, no legal objection is perceived to the approval of payment of the hospital expenses, if otherwise correct, in the cases outlined in [redacted] and (c).

[redacted]

LAWRENCE R. HOUSTON
General Counsel

FOIAb3b

15. These provisions may not be construed, however, to extend as such, the benefits specifically provided in Public Law 110 and in the Federal Employees' Compensation Act, for medical care compensation. With reference to the question of granting retroactive pay increase (equivalent to those authorized by Public Law 201, approved October 24, 1951, and paid to employees coming under the provisions of the Classification Act of 1949), under the authority of section 10 of Public Law 110, the Comptroller General, by letter to the Director date 21 November 1951, ruled in part as follows:

> "...I feel certain it was not contemplated by the sponsors of the bill or by the Congress that this broad authority would be resorted to, or that it ever contemplated a disregard of any control with respect to the normal administrative or operating problems which confront the ordinary Government agency. On the contrary the act itself specifically and in considerable detail delineates the increased authority of your Agency in those matters." (Emphasis supplied)

The proper application of these authorities, however, may be termed the key to the overall CIA Medical Program.

16. With respect to claims submitted to the Bureau of Employees' Compensation, certain highly classified information related to the duties of the employee, circumstances surrounding the incidence of illness or injury, etc., might well be required in any given case. In furtherance of the mandate later placed on the Director by the cited portion of Section 7, classified submission procedures and classified handling of all cases presented to BEC were established with the Director of the Bureau of Employees' Compensation in November 1946. These procedures are presently in effect. FOIAb5

[redacted]

FOIAb5

18. The following examples are given as an illustration of some of the recognizable types of cases that may on occasion require the application of the special authorities outlined:

a. A Career agent, under deep cover, is injured in a publicized accident of a common carrier, oversees, in the performance of his employment with this Agency. The medical office indicates complete recovery within a reasonable length of time. On proper determination that the classified procedures for submission to BEC are not sufficient protection, the case might be handled internally by CIA under the residual authority of the Director. However, complete documentation, in general conformance with BEC procedures, should be effected for transmittal to the Bureau in accordance with the established procedures, at such time as the project might be declassified, or the individual might make claim for permanent disability arising out of the accident.

f. The illness or injury is not the result of negligence on the part of the employee, nor the result of taking an unwarranted risk, unless recovery is substantially retarded because the treatment is below the standard available in the United States.

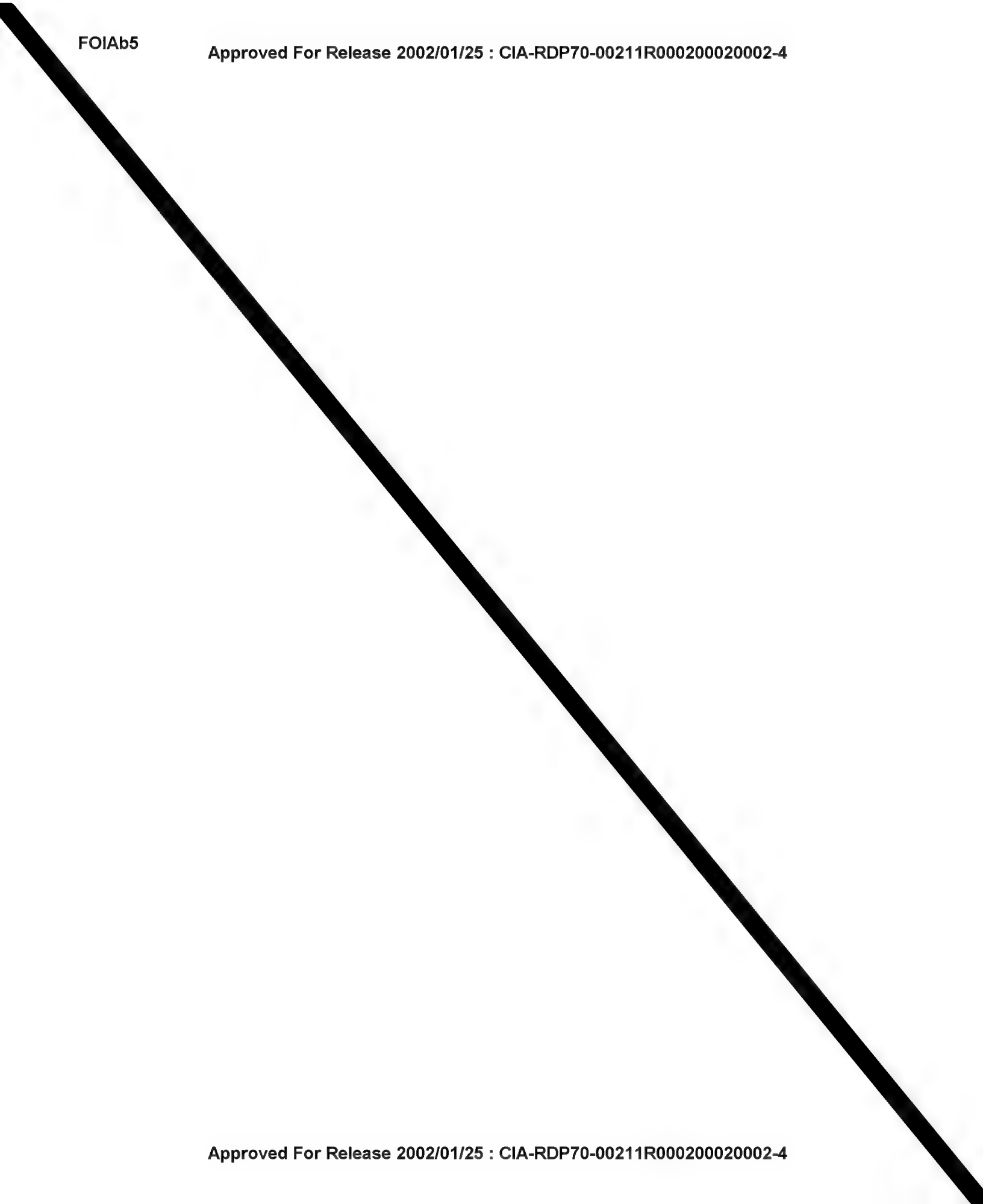
g. The medical and hospitalization expenses are directly related to the treatment of the illness or injury requiring hospitalization and are not excessive in relation to local prevailing prices for medical services and supplies. The rates charged by any available, suitable Government hospitals shall be used as a standard. Payment shall not be made for expenses incurred for personal convenience of the patient, such as telephone bills, extra services, or accommodations superior to what is normally required considering the nature and severity of the illness or injury.

No Coverage for Dependents

12. The Report of the Committee on Foreign Affairs, House of Representatives, in discussing the specific medical authorities granted in the Foreign Service Act made specific mention of the fact that,

> "The absence of the services and facilities authorized... has occasionally subjected individual officers and employees to grave hardship and heavy expense. It is nothing less than good business on a dollar-and-cents basis for the Government to provide such assistance and facilities for Foreign Service personnel." (Emphasis supplied)

Although the problem of the care and transportation of dependents of employees who fall ill in foreign countries and thus place the individual employee in a position of grave hardship and heavy expense, was patently before the Congress, no provision was made for dependents. Congress in its wisdom granted the medical provisions in the State authority with respect to "an officer or employee of the Service who is a citizen of the United States".



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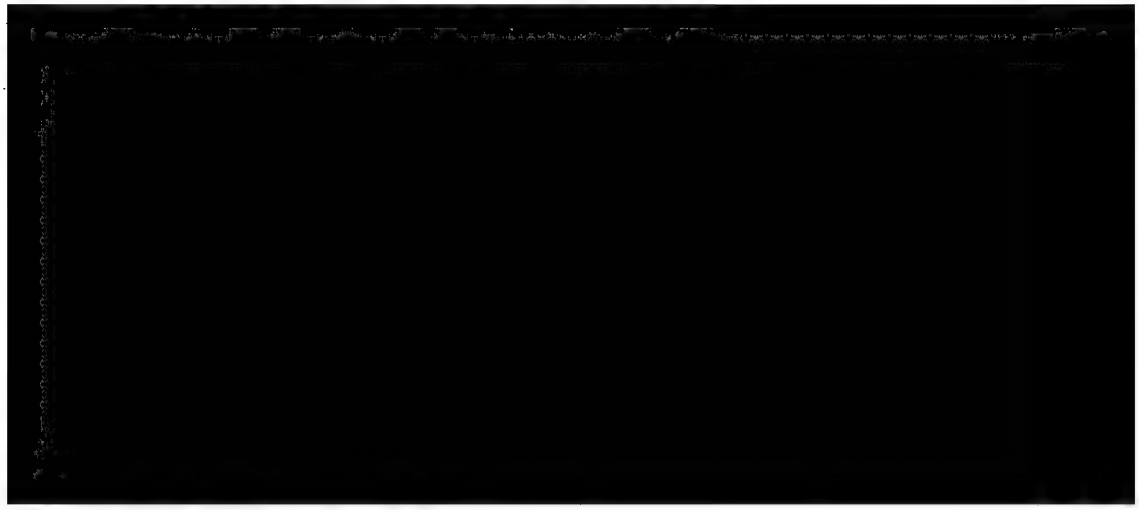

State Department Regulations

11. In order to test the validity of many of the conclusions reached thus far, it is necessary to look to the regulations promulgated by the Secretary of State. In the administration of his authority under sections 941, et seq., of the Foreign Service Act of 1946, all payments made, and regulations pertaining thereto, have been under the careful scrutiny of the Comptroller General. The State medical program is purely overt and provision is made therefore in the yearly budget presented to Congress.

a. A general policy statement is found in Foreign Service Personnel Circular No. 2, subject, "Costs of Hospitalization and Travel to Hospitals," dated 21 March 1949. It is there stated, under the heading "Purpose":

> "This instruction establishes policies and procedures governing the payment, in case of an illness or injury, of the cost of treatment at a suitable hospital or clinic, and of transportation to and from such a hospital or clinic where one does not exist in the locality. The primary purpose of this program is to relieve financial burdens placed upon the Foreign Service Personnel who suffer illnesses or injuries while on assignment abroad. The Department will not therefore approve trivial claims." (Emphasis supplied)

b. The foregoing Personnel Circular has since been incorporated in sections 683, et. seq., Part IV, "Personnel", Foreign Service Manual. Section 683.1, "Conditions of Eligibility", provides in pertinent part as follows:

> a. ...
>
> b. The illness or injury incurred requires hospitalization as judged by the standards generally observed in entering a hospital in the United States as an in-patient.
>
> c. The illness or injury has been incurred or materially aggravated in the line of duty while assigned abroad. "Incurred in the line of duty" means incurred while assigned abroad or materially aggravated by Foreign Service duties in which the employee has engaged. "Assigned abroad" means while physically outside the continental limits of the United States pursuant to official orders.
>
> d. The illness or injury is not the result of vicious habits, intemperance, or misconduct on the part of the employee.
>
> e. The treatment is received at a suitable hospital or clinic, i.e., an institution established for the treatment of a (sic) sick, a dispensary, laboratory, physicians office, or other reputable establishment where a sick person is observed or treated, which has adequate facilities for the treatment of the patient's particular illness or injury. Treatment received at an office building, private home, or elsewhere may be considered as "a suitable hospital or clinic" only when treatment received is such as normally received in a hospital.

of the officer or employee to a nearby post where suitable medical or hospital assistance may exist.

"It is true that the United States Employees' Compensation Act of 1916, as amended, provides within certain limits for the reimbursement of medical and hospital expenses incurred as the result of illness or injury in the line of duty. The provisions of the act do not, however, cover more than a fraction of the problems besetting the Foreign Service. Again, the act does not relate to Foreign Service Officers but only to employees (later amended). It offers no solution in the case of the transportation expenses of an officer or employee to another post for treatment or hospitalization. It does not afford the basis for providing a nurse at a post such as Moscow.

"The absence of the services and facilities authorized by section 941-944 of the new legislation has seriously obstructed the efficient operation of the Foreign Service and has occasionally subjected individual officers and employees to grave hardship and heavy expense. It is nothing less than good business on a dollar-and-cents basis for the Government to provide such assistance and facilities for Foreign Service personnel."

With reference to transportation costs the report states at page 142:

"Section 942 is closely linked with Section 941 and permits the Secretary to pay the transportation expenses of an officer or employee of the Service to a suitable hospital or clinic. If it so happens that the nearest clinic is in the United States, as might be true in the border posts or those in the adjacent islands, the Secretary would be authorized to transport him to the United States...."

Construction

7. In general, the Bureau of Employees' Compensation recognizes as the types of cases coming within the purview of the Federal Employees' Compensation Act, (a) an injury sustained on the premises of employment during working hours, and (b) an illness contracted as a result of working under conditions made necessary by official duties. This coverage extends to federal employment any place in

the world and provides compensation and medical care for employees suffering injuries while in the performance of their duties.

8. When we relate the BEC concept of "performance of duty" to the statements contained in the report of the Committee on Foreign Affairs, paragraph 6, supra, it is seen that the Congressional intent in the use of the phrase "line of duty" contained in State and CIA medical authorities cannot be equated to a liberal interpretation of the phrase "line of duty", which would be, "performance of duty." It is much broader than, and independent of the concept "performance of duty", contained in the Federal Employees' Compensation Act. In application, it encompasses "performance of duty" and extends to cover also illness and injury "not the result of vicious habits, intemperance, or misconduct on his part, incurred while on assignment abroad." The committee stated:

> "It is true that the United States Employees' Compensation Act of 1916, as amended, provides within certain limits for the reimbursement of medical and hospital expenses incurred as the result of illness or injury in the line of duty. The provisions of the act do not, however, cover more than a fraction of the problems besetting the Foreign Service."

9. As to the second question, the relationship between the authorities granted specifically to State and CIA and those granted the Bureau of Employees' Compensation, we must first look to the nature of the authorities.

a. The Federal Employees' Compensation Act provides, (1) full medical care; (2) compensation for loss of wages (in lieu of the application of sick and annual leave); (3) compensation for disability; and (4) compensation for death; for civilian employees, including civilian officers of the United States Government, who suffer illness or injury incurred in the performance of their duties.

b. The State and CIA authorities under discussion relate only to payment for, (1) the cost of treatment; and (2) transportation expense incident thereto; "of illness or injury requiring hospitalization of an officer or ... employee of the Agency ... incurred in the line of duty while such person is assigned abroad."

we hold that such travel is proper only if, in addition to being performed after the date of the travel order, it be performed after the date of eligibility for travel by the employee.

Your letter makes reference to the advance travel provisions of 180 FSTR 2.22, under which dependents may be ordered home at Government expense for humanitarian reasons. We do not think that situation exists in these cases.

The travel of the dependents of Mr. P. was subsequent to the date of his travel order as well as after the date of his eligibility to be ordered home on leave of absence. Also, the accommodations which they used were of the same class and kind authorized for the return of Mr. P. Accordingly, their travel was proper and no deduction need be made for excess costs of travel during the "on" season.

The separate travel of Mrs. W., although subsequent to the date of Mr. W's. travel order, was not subsequent to the date of his eligibility for home leave. Such travel was, therefore, in contemplation of but not pursuant to the employee's travel under the statute. Consequently, expenses incident to this travel should not have been paid except as provided in 29 Comp. Gen. 160 and 30 Comp. Gen. 80, that is, by reimbursement to the employee who has paid such expenses from his personal funds in reasonable anticipation of his own travel. It follows that the basis for reimbursement to Mr. W. for his wife's travel is limited to the cost of her transportation had she traveled in accordance with his authorization, or during the "off" season, when rates were lower. Accordingly, the administrative action in deducting $101 from the account of Mr. W. was proper.

The vouchers are returned herewith for disposition in accordance with this decision.

The Department of State Appropriation Act, 1947, provided in pertinent part authority "to pay the traveling expenses of *** Foreign Service officers *** and under such regulations as the Secretary of State may prescribe, of their families *** including expenses in connection with leaves of absence."

Notwithstanding the change in language in the new act it seems clear that Congress did not contemplate any major change in the application of benefits for dependents in home leave situations.

The travel regulations of the Department of State, issued by the Secretary of State pursuant to the various appropriation acts, provided in Note 35, Supplement E, Chapter V issued April 1939, at page 22, as follows:

> "The expenses of the family of an officer or employee entitled to transportation at Government expense will be allowed *** whether they accompany, or follow, or precede him, provided their departure is subsequent to the date of his travel order. Such expenses will not be allowed, however, where the members of the family following him begin the journey later than six months after the departure of the officer or employee, ***"

Similar provision is contained in the current Foreign Service Travel Regulations, 180 FSTR 3.61, dated June 29, 1953:

> "Appointment, Transfer, or Leave at Government Expense
>
> "The actual departure of the employee under appropriate travel authorization may be directed by administrative determination. The actual departure of all dependents and the beginning of shipment of all effects may take place on or after the date of the authorization but shall not be deferred more than 6 months after the employee completes his personal travel pursuant to the authorization.***"

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[redacted]

Although we understand the present interpretation by the Department of State of 180 FSTR 3.61 is that any travel of dependents authorized pursuant thereto is proper if performed after the date of issuance of the employee's travel orders, we believe that some meaning should be accorded the language "accompanying him on authorized home leave" appearing in the basic statute. Accordingly,

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DECISION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

B-128250 (UNPUBLISHED) August 14, 1956

Excess costs incurred because dependents travel in advance of employee are reimbursable if the dependents travel after the employee acquires eligibility to travel.

ASSISTANT COMPTROLLER GENERAL WHITZEL TO THE DIRECTOR OF CENTRAL INTELLIGENCE

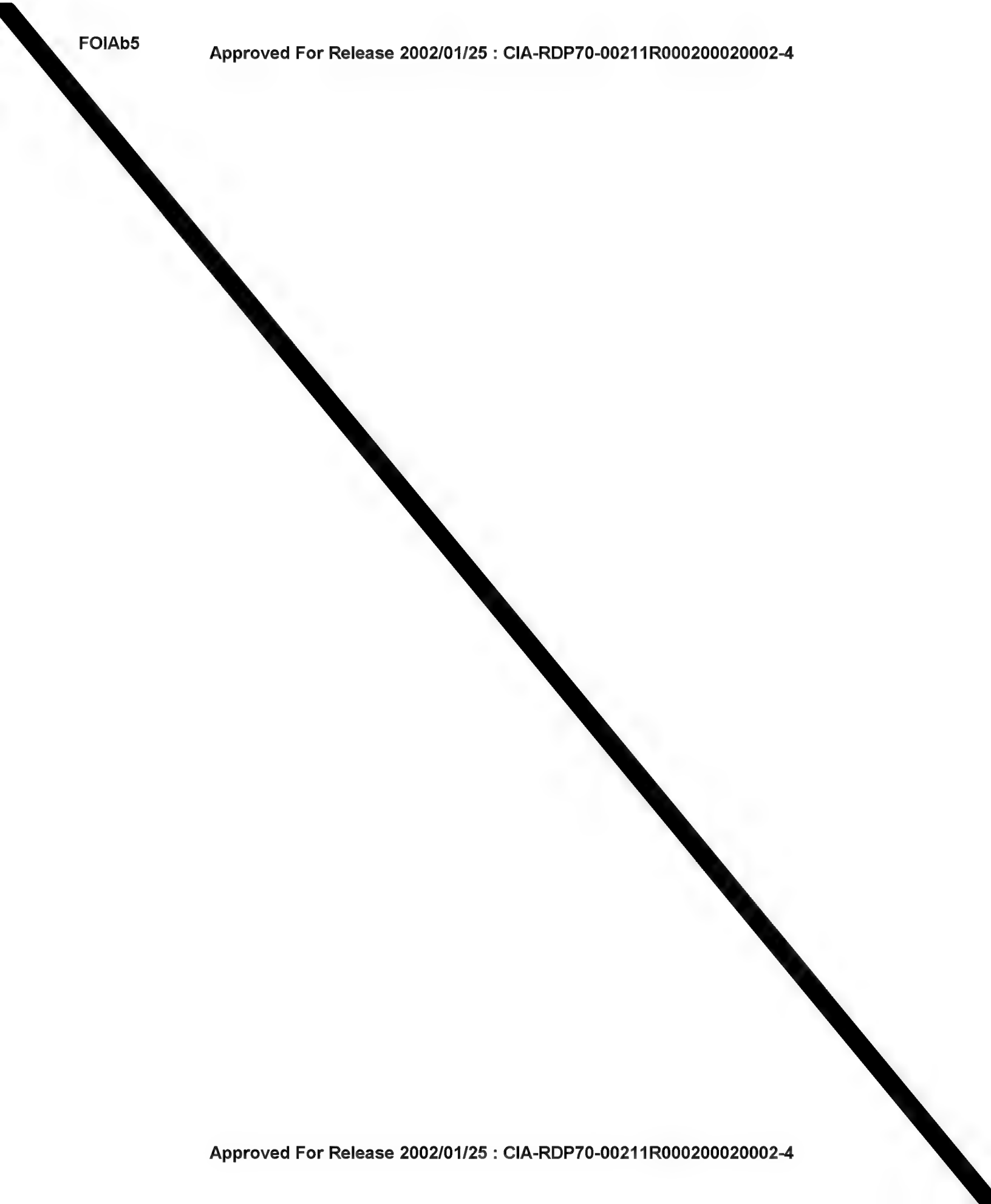
Your letter of June 12, 1956, requests our decision as to whether you may certify for payment the two enclosed vouchers for $211.86 and $101 in favor of J. R. P. and W. H. W., respectively. The amounts covered by these vouchers represent dependents' travel expenses which were deducted from the original expense accounts prior to certification for payment because the dependents, traveling under home leave orders of the employees, elected to travel in advance of the employees at a time when fares were higher than when the employees traveled.

You say that travel order dated August 31, 1953, authorized Mr. P. to travel on or about October 15, 1953, for home leave to the United States and included authorization for travel of his dependents. Mr. P. became eligible for home leave on October 12, 1953. The record reflects that the dependents of Mr. P. departed on October 29, 1953, but that the employee delayed departure (for reasons not stated) until November 9, 1953. "On" season rates were in effect until November 1, 1953, at which time "off" season, or reduced rates, went into effect.

Mr. W's. travel order, dated September 17, 1953, authorized home leave travel to the United States on or about November 12, 1953, for himself and his wife. Mr. W. became eligible for home leave on November 1, 1953. Mrs. W. departed on October 29, 1953, but Mr. W. delayed departure until December 27, 1953. In this instance, also, excess costs resulted from Mrs. W's. travel during the "on" season.

Separate travel was not specifically authorized in either travel order, although the requests from the overseas office asked for approval of separate travel of the dependents.

Sections 5(a)(1)(B) and 5(a)(3)(A) of the Central Intelligence Agency Act of 1949, 63 Stat. 208, 50 U.S.C. 403e(a)(1)(a), (a)(3)(a), provide that:



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DECISION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

B-124146 (UNPUBLISHED) July 7, 1955

A person serving this Agency as a contract agent, the nature of whose services clearly indicate that he is an independent contractor, rather than an employee, does not hold an office or position within the meaning of the dual compensation statutes.

COMPTROLLER GENERAL WARREN TO THE DIRECTOR OF CENTRAL INTELLIGENCE

Reference is made to your letter of May 21, 1955, requesting our decision upon the question whether retired commissioned officers of the armed services lawfully may be employed by your Agency under the circumstances related in your letter and receive remuneration incident to such employment without violating section 2 of the act of July 31, 1894, as amended, 5 U.S.C. 62, and section 212 of the act of June 30, 1932, as amended, 5 U.S.C. 59a. The 1894 act prohibits the holding of two offices if the compensation of either amounts to the sum of $2,500 per annum while section 212 of the 1932 act precludes the concurrent receipt by a retired officer of civilian compensation and retired pay on account of commissioned service at a combined annual rate in excess of $3,000.

It is stated in your letter than certain types of services required in the fulfillment of your unique functions cannot be economically and satisfactorily performed by regular employees of your Agency and that, therefore, you have entered into contracts with certain individuals for the furnishing of confidential information and services which contracts normally provide for payment of a fee at a stated amount per year of service. In that connection you state that your Agency's requirements may be precise and for a single occasion or they may be broad contemplating an extended period and that there normally is no accurate method of putting a dollar value on the information or services to be obtained, although in certain cases a negotiated figure is reached. In most cases, however, it is stated that the fairest method of computing the fee involved is upon an annual basis and that such fee is regarded as being the equivalent of a retainer fee paid an attorney in private practice which frequently is paid upon an annual basis.

In connection with the character of employment, the following facts appear. Your agency exercises no control or supervision over the performance of the work of the contractor; it provides no office space,

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facilities, tools, or appliances; there are no prescribed hours of work; and the individual in his discretion carries out the work at such times and under such circumstances as he deems expedient. In connection with the prosecution of the work he may utilize the services of other persons as he sees fit and such persons are not subject to the supervision of your Agency. In short, the individual is told what information your Agency desires and is left to his own resources and devices to obtain that information.

Since all of the related facts pertaining to the employment in question, with the exception perhaps of the method of payment, strongly indicate that the relationship of the individual to the Government is that of an independent contractor rather than an employee we are of the view that such employment does not constitute the holding of a second office in violation of the 1894 statute.

While it has been held that retired officers employed by the Government and paid on a time basis are subject to the double compensation restrictions contained in section 212 of the Economy Act (see 28 Comp. Gen. 381), we do not feel that the rule enunciated in that decision and applied in similar cases is for application in the instant case. The time actually to be worked by an individual under a contract such as here involved does not actually constitute the basis for payment although his fee covers a period of actual or potential service of one year. In that connection, no time records are kept and no hours of duty are prescribed. Rather, the time worked is left entirely to the discretion of the individual. The very nature of the job--the procurement of confidential information--for which the individual is hired realistically is inconsistent with the concept of employment upon the basis of time actually worked. We, therefore, concur in your view that the yearly payment reasonably may be regarded as a payment of a fee for such services as the individual may be called upon to render during the year and is in the nature of an attorney's general retainer fee which does not have reference to any particular service but takes in the whole range of possible future contention which may render attorneyship necessary or desirable. Agnew v. Walden, et al., 4 So. 672, 673. Accordingly, we conclude that section 212 of the act of June 30, 1932, has no application to employment under the circumstances related in your letter.

UNCLASSIFIED

UNITED STATES GENERAL ACCOUNTING OFFICE

CE Z 1530605-WHS-9 July 27, 1954

Damages sustained by employees in the packing and shipment of household goods are personal to the employees.

The Government cannot be made agent or trustee for the collection of debts in which it has no actual concern.

CLAIMS BRANCH, G.A.O. TO FISCAL DIVISION, C.I.A.

Returned herewith for appropriate disposition by your office are the files relative to the damages sustained by J. B. B., V. C., and N. C. H., employees of your agency, in the packing and shipment of household goods on official change of station from W. to K., C., during 1951. STATINTL

The contract provides in item 5 that financial responsibility for loss or damage to effects while in their control and for loss or damage to effects resulting from the contractor's negligence or improper performance under the contract is personal to the owner of the effects.

It appears from your letter dated May 13, 1954, that the purpose in forwarding the files to this Office is to attempt collection from the packer, for apparently improper packing and crating, in order to reimburse the employees for the losses sustained. In this connection you are advised that is has been consistently held by the accounting officers of the Government that the Government cannot be made agent or trustee for the collection of debts in which the Government has no actual concern. See 17 Comp. Gen. 329 and 15 Comp. Gen. 38.

In view of the above, and as the remedy for damages sustained appears to be personal with the employees, it is suggested that they prosecute the matter to final adjustment.

UNCLASSIFIED

> law or regulation to the contrary: Provided, That the President may, by Executive order, exempt from the provisions of this section any person when, in his judgment, the public interest so requires: Provided further, That no such person heretofore or hereafter separated from the services of the United States or the District of Columbia under any provision of law or regulation providing for such retirement on account of age shall be eligible again to appointment to any appointive office, position, or employment under the United States or the District of Columbia: Provided further, That this section shall not apply to any person named in any Act of Congress providing for the continuance of such person in the service."

In view of the provisions of that act, it appears that the reemployment of Foreign Service officers, automatically retired for age, in other branches of the Federal service would be precluded unless specifically authorized in the manner set forth therein. Question 1 is answered accordingly, and, because of the nonapplicability of the 1894 statute, as previously indicated, questions 2,3 and 4 are answered in the affirmative.

With respect to question 5 it may be stated that the retired officer involved in the decision of this Office dated August 6,1936, supra, filed a suit in the Court of Claims and obtained judgment in his favor. See Brunswick v. United States, 90 C.Cls. 285. However, while the decisions of the Court of Claims are followed herein in many instances they are not binding upon this Office in the absence of affirmation by the Supreme Court of the United States. Moreover, the Department of State continued to suspend the retirement annuities of Foreign Service officers during the periods they were employed in the Government service even after the enactment of the Foreign Service Act of 1946, as amended, 60 Stat. 999, that Department apparently being of the view that no change occurred in the situation by reason of the enactment of that statute.

In view of the obvious inequity of permitting foreign service officers retired for disability to receive both retirement annuity and full compensation in another Government agency, when not

permitted if reemployed in the foreign service, and when all other officers or employees of the Government when retired and reemployed are required, with certain statutory exceptions, to forego a portion or all of their retired pay (military or civilian) or have their civilian active duty pay reduced, this Office does not feel warranted in making any change in the views expressed in 16 Comp. Gen. 121. Accordingly, question 5 is answered in the negative.

UNCLASSIFIED

DECISION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

B-106300 (32 C.G. 89) 12 August 1952

A Foreign Service Officer retired for age may not be reemployed in another branch of the Federal service. A Foreign Service Officer, retired for reasons other than age, may be reemployed in another branch of the Federal service, but he may not receive both his retirement annuity and full compensation in another agency.

COMPTROLLER GENERAL WARREN TO THE DIRECTOR OF CENTRAL INTELLIGENCE

Reference is made to your letter of October 29, 1951, requesting a decision upon certain questions involving the proposed employment of retired Foreign Service Officers as well as the right of such officers to retain their retirement annuities upon employment in other Government agencies. You may be advised that action in this case was delayed pending the receipt of a report from the Department of State in the matter which report now has been received.

In your letter reference is made to section 2 of the act of July 31, 1894, 5 U.S.C. 62, which provides, in pertinent part, that:

> "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law * * *."

Your questions, which follow, are predicated in part upon those provisions:

> "1. May a Foreign Service Officer, retired for age and in receipt of an annuity exceeding $2,500.00 per year, be appointed to a full-time position with another agency of the Federal Government?
>
> "2. May a Foreign Service Officer, retired for disability or incapacity and in receipt of an annuity exceeding $2,500.00 per year, be appointed to a full-time position with another agency of the Federal Government?

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"3. May a Foreign Service Officer, retired upon his own application (under Sec. 636 of the Foreign Service Act of 1946) and in receipt of an annuity exceeding $2,500.00 per year, be appointed to a full-time position with another agency of the Federal Government?

"4. May a Foreign Service Officer, 'selected out' (under the provisions of Sec. 637 of the Foreign Service Act of 1946) and in receipt of an annuity exceeding $2,500.00 per year, be appointed to a full-time position with another agency of the Federal Government?

"5. If any retired Foreign Service Officer enumerated above may be appointed to a full-time position with another agency of the Federal Government, may he continue to receive his annuity concurrently with the salary of his full-time position?"

In Office decision of August 6, 1936, 16 Comp. Gen. 121, also referred to in your letter, it was held that, while there was no prohibition in the Foreign Service retirement act against the reemployment in the Executive civil service of a Foreign Service officer retired for disability, there was no authority for the payment of his retirement annuity concurrently for the period of such employment. Although the retirement annuity in that case was less than $2,500.00 it was not considered necessary to restrict that ruling to cases involving amounts less than $2,500.00 because it was realized that a retired civilian employee does not hold an office within the meaning of the 1894 statute, supra.

Referring specifically to question No. 1, involving the reemployment of Foreign Service officers retired for age, your attention is invited to the provisions of section 204 of the act of June 30, 1932, 47 Stat. 404 (5 U.S.C. 715a), as follows:

"On and after July 1, 1932, no person rendering civilian service in any branch or service of the United States Government or the municipal government of the District of Columbia who shall have reached the retirement age prescribed for automatic separation from the service, applicable to such person, shall be continued in such service, notwithstanding any provision of

Congress and for that reason did not object to the grant of what must be conceded as unusual authority. But I feel certain it was not contemplated by the sponsors of the bill or by the Congress that this broad authority would be resorted to, or that it even contemplated a disregard of any control with respect to the normal administrative or operating problems which confront the ordinary Government agency. On the contrary the act itself specifically and in considerable detail delineates the increased authority of your Agency in those matters. To adopt the view suggested in your letter would be equivalent to concluding that your Agency is authorized to grant retroactive increases, bonuses, or other perquisites to any or all of its employees with such frequency, or at such times, as desired, contingent only on the availability of funds. I cannot attribute any such intention to the Congress.

Under the circumstances, it must be held that the proposed retroactive increases by the Central Intelligence Agency are not "necessary to carry out its functions" within the meaning of the said section 10 and therefore, would be subject to legal objection.

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Approved For Release 2002/01/25 : CIA-RDP70-00211R000200020002-4

SECRET

GENERAL COUNSEL'S OPINION NUMBER 56-4, DATED 22 MAY 1956

A release purporting to save the Government from liability for the results of the negligence of its agents is ineffective against an employee's right to compensation under the Federal Employee's Compensation Act.

The effectiveness of such a release as a defense against an action brought under the Federal Tort Claims Act is questionable.

TO THE DIRECTOR OF TRAINING

1. You have consulted us on the legal implications in having persons who fly between here and X-------- on the Y------- plane for their own convenience execute a release which would save the Government from any liability to the survivors of such persons in the event of their death or injury.

2. Claims against the United States for personal injury or death as a result of an accident involving the Y------- plane will be cognizable under the provisions of the Federal Employees' Compensation Act in the case of employees injured while in the performance of their duty. Those not in the performance of duty may bring action against the United States under the provisions of the Federal Tort Claims Act. The remedies are exclusive and the employees right of action is not his to choose, but is determined on the basis of his duty status. The employees whom you wish to have execute a release will not be in the performance of duty while travelling and therefore any claims for their injury or death will be pursued under the provisions of the Federal Tort Claims Act. The validity of the release in such cases is questionable. The release should not be used where the employee is travelling in a duty status. Such an employee is entitled to the remedies provided in the Federal Employees' Compensation Act and an agreement to waive those remedies will not be effective. The Regulations provide:

> "S 1.23 Waiver not authorized. No official superior is authorized to require an employee to enter into any agreement, either before or after an injury, to waive his right to claim compensation."

SECRET

The discussion below, therefore, is concerned only with the validity of the release in case of an action against the United States under the provisions of the Federal Tort Claims Act.

3. The use of such a release is common in the military service when persons are carried for their own convenience rather than on official business. We discussed the problem with Colonel M. and Major F. of the Military Affairs Section, Air Force JAG. They both have serious doubt as to the validity of the release. MATS uses the release not only for passengers travelling for their own convenience but for employees of other Government agencies and contractors who may be travelling on official business. To date the validity of the release has not been tested in Court. It was raised in one case (Chapman et ux v. United States, 194 F. 2d 974) but the Court decided the case on other grounds and declined to rule on the validity of the release. Colonel M. and Major F. feel that the release would not be upheld if contested in Court simply on the ground that it is an attempted contract against liability for future negligence and as such would be held to be against public policy. They feel that its greatest value may be that it will discourage actions against the Government in many cases and perhaps encourage some passengers to take out flight life insurance, thereby reducing the chance that a survivor would attempt to sue the Government.

4. As stated above, the Courts have yet to rule upon the question with which we are directly concerned. There are, however, cases and textbook law on similar situations. These are generally concerned with common carriers, most often railroads. Williston on Contracts, Revised Edition, Volume 4, Section 1109 states: "A carrier may not stipulate for freedom from liability for negligence." This section of the treatise is, of course, concerned with common carriers and, therefore, the situation is not quite the same as in the case of a Government-owned aircraft not carrying passengers for hire. Williston's reasoning in this section would seem to favor the releases concerned here at least insofar as passengers carried for their own convenience are concerned. He states at page 3103: "A distinction is taken between services for which the carrier receives compensation, and services rendered gratuitously. As to the latter, the carrier may, in the majority of jurisdictions, contract for freedom from liability for negligence. Therefore, a gratuitous pass providing that a passenger riding thereon exempts from liability the carrier for injuries caused by the negligence of the carrier is enforced, unless the carrier was guilty of gross negligence or wilful misconduct. It is important to observe, however,

that transportation is not necessarily gratuitous because no payment is directly made for it. Thus, where an employee is given a pass as part of his compensation . . ., the passenger is carried for compensation, and the carrier cannot exempt itself from liability where the consequence is of its own negligence."

5. Restatement of Contracts, Section 575, states the law in this field as follows: "(1) A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if (a) the parties are employer and employee and the bargain relates to negligent injury of the employee in the course of the employment, or (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation."

6. Given the situation as stated by the Office of Training, that is where the aircraft is not a common carrier and where the employee is carried only for his convenience, there would seem to be at least a chance of the validity of the release in question being upheld in an action for damages against the United States. A further protection of a practical nature may be the hesitancy of the courts to find negligence on the part of the pilot of an aircraft. More often than not the proximate cause of an aircraft accident cannot be determined, at least not to a degree sufficient to satisfy a court trying a negligence case. In addition, as in the Chapman case cited above, the court may be unwilling to rule that any particular action of a pilot in a moment of emergency was negligent. The court is more inclined to say that in the split second and under the emergency conditions in which a pilot had to make a life or death decision no action by him in attempting to avoid the accident can be said by a court with the benefit of leisurely aftersight to be negligent. In addition to the emergency situation the pilot's own life is at stake and it usually will be assumed that he took the action which seemed at the moment most reasonable under the circumstances.

7. In summary: The release would be invalid in the case of an employee injured or killed in performance of duty and entitled to compensation under the Federal Employees' Compensation Act. Employees flying on business should not be requested to sign it. Its validity

in the case of an employee flying for his own convenience cannot be ascertained in the absence of case precedent. However, it might be useful as evidence of the employee's non-duty status and in addition to its cautionary and deterrent value, there is reason to believe that its validity might be upheld in a test by litigation. Under the circumstances this Office will interpose no legal objection to a policy decision to use such a release when the employee is flying for his own convenience.

[redacted]

LAWRENCE R. HOUSTON
General Counsel

FOIAb3b

SECRET

GENERAL COUNSEL'S OPINION NUMBER 56-5, DATED 22 JUNE 1956

Application of the Uniform Code of Military Justice to American civilian employees abroad.

TO THE CHIEF OF STATION, [redacted] 25X1A6a

1. Your dispatch dated 29 March 1956, raised several questions about the applicability of the Uniform Code of Military Justice to American civilian employees abroad. The law is not settled on all facets of this issue, but the following summary should answer some of your questions.

2. The Supreme Court handed down a decision on 11 June in two cases (Krueger and Covert), holding that courts-martial have jurisdiction to try dependents of Armed Forces uniformed personnel. In reaching this decision the Court distinguished the Toth case.

3. The above decisions do not, of course, affect the question of the amenability to court-martial jurisdiction of civilian employees of the Armed Forces or their dependents. If it should be held in some future cases that civilians accompanying the Armed Forces are not subject to court-martial, then, under the present state of affairs where U. S. District Courts generally have no jurisdiction over offenses committed abroad, there would be no concurrent U. S. jurisdiction under the Status of Forces Agreements. Therefore, offenders would be triable by foreign courts and only foreign courts. 25X1C

[redacted]

5. You will recall that in the two 1945 cases you cited (Di Bartolo and Perlstein) civilians were held amenable to court-martial jurisdiction even though they were actually employees of an

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independent contractor under contract to the Air Force, and each had already been discharged from his job and was awaiting transportation home at the time he committed a theft and was committed for trial. Defense advises that the results in these two cases have been upheld in similar cases arising subsequently. If these individuals were held amenable to court-martial jurisdiction after discharge, clearly they were subject to such jurisdiction prior to discharge. If employees of an independent contractor are amenable to court-martial

25X1C

[redacted]

7. A copy of the opinion in the Krueger and Covert cases is attached. Also attached is a comment that we had prepared on other germane cases prior to the Krueger and Covert decisions.

25X1A

[redacted]

LAWRENCE R. HOUSTON
General Counsel

Attachments

SECRET

GENERAL COUNSEL'S OPINION NUMBER 56-6, DATED 2 JULY 1956

An employee may not be reimbursed for the cost of shipping a privately owned automobile to a foreign port, even though he holds legal title to the automobile, when the purchase of the automobile is financed by another person with the intent of making a profit upon re-sale.

TO THE DIRECTOR OF PERSONNEL

1. The Chief, Administrative Staff, Office of Communications, has requested this Office to resolve a question of the validity of Mr. A's claim for the shipment of his automobile to T. A new Lincoln invoiced and consigned to Mr. A. by the International Division of Ford Motor Company arrived in T. in July, 1954. Some question arose as to whether this car and several others may not have been financed for profit by another Agency employee at the station. For this reason the station refused to honor Mr. A's claim for reimbursement of shipping costs. After returning to headquarters, A. again submitted the claim and it was denied on the grounds that there was inadequate proof of payment for the car and inadequate proof of ownership. Mr. A., who has since resigned from the Agency, has again submitted a claim, this time including a letter from the Ford Motor Company adknowledging receipt of payment for the car and setting forth the charges for freight, insurance and consul fees.

2. An investigation of the circumstances surrounding the purchase and import of Mr. A's car and several others was conducted by the Security Officer at T. The report of this investigation contains convincing evidence that the vehicles concerned were financed by another station member with an understanding that the profits or at least a share of the profits upon resale would accrue to that station member. Mr. A. has claimed that the advance to him was a loan which would be repaid with interest upon resale of the car and that there was no agreement that any of the profits upon resale would accrue to the person supplying the purchase money. During the investigation of the purchase and import of these cars Mr. A. made a written statement admitting that the person who financed the purchase ordered the automobile for him in his (A's) name. The dealer through whom the cars were ordered confirmed this and in addition stated that the person ordering the car for A. had written a personal check in payment for it.

SECRET

3. It is the opinion of this Office that Mr. A. held only bare legal title to the automobile in question and that he was in fact a trustee for the person who financed its purchase. If there had been a loan as Mr. A. has claimed the trust situation would not have arisen and Mr. A. would have held both legal and beneficial title to the automobile. However the preponderance of the evidence in the investigative report indicates that the purchase money was advanced with an understanding that some or all of the profits upon resale would accrue to the person advancing the funds. There is little evidence aside from the self-serving statements of A. and the person financing the purchase that this was in fact a loan. There is insufficient evidence to rebut that in the investigative report giving rise to a presumption that there was an arrangement for purchase and resale for profit.

4. Under these circumstances, and in the absence of sufficient evidence of clear title in Mr. A., it is the opinion of this Office that he may not be reimbursed for shipment of the car to the foreign duty station.

5. It is suggested that in replying to Mr. A's letter of May 20, requesting reimbursement you state that inasmuch as the facts developed in the investigation indicate that he held the car as trustee for the benefit of the person who financed its purchase and had only bare legal title, he did not have ownership within the meaning of the law and regulations permitting reimbursement for the shipment of privately owned automobiles and that therefore the claim must be denied.

[redacted]

LAWRENCE R. HOUSTON
General Counsel

FOIAb3b

Attachment - General Counsel's Opinion No. 56-5

20 Op. Atty. Gen. 590

CRIMES IN FOREIGN COUNTRIES.

No Federal court has jurisdiction to try persons whether or not claiming to be American citizens for crimes committed in foreign countries. There are no common law offenses against the United States.

DEPARTMENT OF JUSTICE,
May 8, 1893

SIR: I am in receipt of your communication of March 17, in relation
STATINTL to the case of [redacted]

I am informed that said [redacted] claiming to be a citizen of theSTATINTL United States, is charged with murdering a native upon land in one of the New Hebrides Islands; that said islands are under the domain of no civilized power, except that Great Britain exercises some jurisdiction over them through a high commissioner, who, however, declines to exercise jurisdiction over this case; and that the islands are not within the jurisdiction of any consular officer of this Government.

My official opinion is asked as to whether any Federal Court would
STATINTL have jurisdiction to try [redacted] upon this charge if he should be brought before it under section 730 of the Revised Statutes, which provides that--

> "The trial of all offenses committed upon the high seas OR ELSEWHERE out of the jurisdiction of any particular State or district shall be in the district where the offender is found, or into which he is first brought."

But the word "offenses" means "offenses against the United States." There are no common law offenses against the United States and Congress has not placed wrongs done upon foreign soil in this category.

I am obliged to answer the question in the negative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF STATE

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DECISION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

B-105707 (UNPUBLISHED) October 19, 1951

Services for this Agency by a retired Navy officer as a consultant paid on a fee basis is not the holding of a civilian office or position within the meaning of the dual compensation statutes.

COMPTROLLER GENERAL WARREN TO THE DIRECTOR OF CENTRAL INTELLIGENCE

Reference is made to your letter of September 13, 1951, file XB4:D:53 7624, requesting advice whether the retired pay of [redacted] 25X1A9a
25X1A9a [redacted] is subject to the provisions of section 212 of the Economy Act of 1932, because of his employment by the Central Intelligence Agency as a consultant onan intermittent basis.

Section 212 of the Economy Act approved June 30, 1932, 47 Stat. 406, as amended, codified as 5 U.S. Code 59a, provides:

> "After June 30, 1932, no person holding a civilian office or position, appointive or elective, under the United States Government or the municipal government of the District of Columbia or under any corporation, the majority of the stock of which is owned by the United States, shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in Title 37, at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000; and when the retired pay amounts to or exceeds the rate of $3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term 'retired pay' shall be construed to include credits for all services that lawfully may enter into the computation thereof."

25X1A9a [redacted]s to be regarded as holding "a civilian office or position * * * under the United States Government." In Office decision of January 17, 1947, 26 Comp. Gen. 501, it was held that the

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employment of a retired officer on a fee basis as a consultant in an advisory capacity is not the holding of a "civilian office or position" within the meaning of section 212 of said statute. However, in commenting on that decision in 28 Comp. Gen. 381, it was stated as follows:

> "* * * that holding was not intended as excepting from the provisions of the said section 212 of the Economy Act all retired officers merely because of their employment designation, for administrative purposes, as 'consultants'--a title which necessarily implies the rendition of a certain amount of consultation services, comprising the expression of views and the giving of opinions and recommendations, but which does not necessarily limit the services to be rendered thereunder, to such narrow confines. Rather, said holding was based upon the proposition that where the nature of the duties required is purely advisory, generally performed at infrequent intervals, and the compensation payable therefor is upon a fee basis, as distinguished from a purely time basis, the status of the employee is not such as would constitute the holding of an office or position within contemplation of section 212. * * *"

A copy of [redacted] contract of employment enclosed with your letter reveals that he was employed as an intermittent consultant "to consult with the National Estimates Board as a specialist in armed service (primarily naval) aspects of national intelligence estimates," and that his rate of compensation is fixed at $50 per consultation. 25X1A9a

It informally has been ascertained from the Central Intelligence Agency that the consultant services of [redacted] when called upon from time to time are purely advisory and rather infrequent. Also, that such consultations normally do not require more than one day but in the event they should extend over into the next day, the Admiral would only be entitled to one fee of $50. Clearly, therefore, the employment of [redacted] is predicated upon a fee basis rather than a time basis and that factor together with the other circumstances of his employment is not to be regarded as a "civilian office or position" within the meaning of section 212 of the Economy Act of 1932, supra. 25X1A9a 25X1A9a

Accordingly, you are advised that [redacted] is entitled to 25X1A9a

his retired pay in addition to the fees received from his employment with the Central Intelligence Agency.

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DECISION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

B-93365 (UNPUBLISHED) March 16, 1950

Periods of consultation in the United States do not constitute a break in continuous service abroad. Leave spent in the United States does not constitute a break in continuous service abroad, but should not be counted as service abroad in determining eligibility for home leave.

COMPTROLLER GENERAL WARREN TO THE DIRECTOR OF CENTRAL INTELLIGENCE

Reference is made to your letter of February 28, 1950, FR-O-8913 requesting decision upon the questions therein stated, as follows:

"1. When an employee regularly assigned to an overseas post temporarily returns to the United States for purposes of official consultation, does the grant of a period of either annual or sick leave while in the United States break the continuity of his 'continuous service abroad'?

"2. Does the granting of a period of annual leave to permit return to the United States at the personal expense of an employee regularly assigned to an overseas post, solely for the purpose of meeting a personal emergency, interrupt the continuity of his 'continuous service abroad'?

"3. In the event an employee is returned to the United States on sick leave under proper authorization at Government expense prior to the expiration of two years' 'continuous service abroad', does it interrupt the continuity of such service?

"4. If any or all of the three questions presented above are answered in the negative, is the amount of leave taken subject to a maximum time limitation?

"5. If questions 1,2, and 3, or any of them are answered in the negative, must the period of 'continuous service abroad' be extended beyond two years for a period equal to the amount of interim leave taken before the employee is entitled to home leave?

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"6. If in any case covered by the first three questions, leave is construed to constitute a break in service, would it be required to again start a new two year period for home leave purposes upon return to the foreign post?"

FOIAb5

In 19 Comp. Gen. 750, referred to by you, it was held quoting from the syllabus:

"Section 22 of the act of February 23, 1931, 46 Stat. 1210, authorizing the Secretary of State to order to the United States on his statutory leave of absence, at Government expense, any Foreign Service officer or vice consul of career who has performed 3 years or more of continuous service abroad, does not require that an officer remain at all times physically present within the service abroad in order to meet the 'continuous service' requirement, and where an officer's temporary return to the United States for consultation purposes had direct connection with, or relation to, his assigned post of duty abroad, it did not constitute a break in his 'continuous service abroad' within the meaning of the section."

 FOIAb5

[redacted]

With respect to question 4, the amount of leave taken in the United States under conditions specified in questions 1, 2, and 3 would not appear to be material except, of course, that it should not exceed the maximum amount of sick or annual leave which may be granted under the applicable annual and sick leave regulations.

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DECISION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

B-72680 (UNPUBLISHED) March 10, 1948

Increased allowances for employees at classified posts, payable under Bureau of the Budget Circular No. A-8, Revised, are payable only if an employee's wife or other dependents are living with him at the post.

COMPTROLLER GENERAL WARREN TO THE DIRECTOR OF CENTRAL INTELLIGENCE

Reference is made to your letter of January 7, 1948, as follows:

"It has come to my attention that there is some doubt in the minds of this Agency's Finance officials and Authorized Certifying Officers with respect to the proper amounts of quarters and cost of living allowances to be paid at classified posts under the provisions of Bureau of the Budget Circular No. A-8, Revised. The question currently involved relates specifically to payments which should be made to married employees.

"It has been our understanding that the increased allowances at classified posts are payable to married employees (regardless of whether or not the wife resides at the post) or unmarried employees with families at their foreign posts, with only the basic allowances payable to single employees without families at the posts. Accordingly, a married employee has automatically been granted the increased allowances for both Quarters and Cost of Living without taking into consideration whether or not his wife lives with him at the post. Of course, an employee who is not responsible for the support of a wife, because of death, divorce, or other appropriate reasons, has been paid only the basic allowances unless members of his family were present. It has now been brought to our attention that it may be proper to pay married employees the increased allowances only if their wives or members of their families are living with them.

"To support the interpretation heretofore followed by this office attention is invited to Appendix II, Circular No. A-8, Revised, which sets forth the quarters allowances payable under the various Post classifications. The increased allowances authorized by this appendix are payable to employees who are 'married, or unmarried with family', and the basic allowances are payable to employees who are 'single,

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without family'. Circular No. A-8 Revised, stipulates that 'family' means the mother, father, children, stepchildren or sister of a married or unmarried employee living with the employee at the foreign post. It is of primary importance to note that the definition omits any mention of a wife. It is also to be noted that the cost of Living Allowance schedules provide for allowances for personnel 'With Dependents' and 'Without Dependents'. Further, Standard Form 1069-Rev., Voucher for Allowances at Foreign Posts of Duty, which has been prescribed for use in the payment of quarters and cost of living allowances, is so devised that a married employee who does not have his wife living with him at his foreign post would have to add a statement to that effect on the face of the form before it could be properly certified and presented for payment. The following certifications appear on the face of the form and are to be checked by the employee when he executes his claim: 'I am married, or unmarried, and have living with me at the above mentioned post or station, children, stepchildren, mother, father or sister' and 'I am unmarried and have no children, stepchildren, mother, father or sister living with me at the above-mentioned post or station'. It appears that if a married employee is not entitled to the increased allowance, because his wife does not live with him, neither of the quoted certifications will provide the necessary information. The pertinent instructions seem to indicate that a married man who does not have his wife residing with him is entitled to the increased allowances.

"It is assumed that a dependent husband would take the same status for allowance purposes as a wife. Your decision of April 3, 1947 (B-63474) to Mr. W. H. Rohrman, Authorized Certifying Officer, Department of Agriculture, has been noted.

"It will be appreciated if you will render a decision in this matter at the earliest possible date. If you should rule that a married employee must have his wife at his foreign post of duty in order to be entitled to the increased allowances (in the absence of other members of his family) this office will immediately alter its payment procedure in those few cases affected. In the event of such a ruling, it is requested that because of the terminology contained in Bureau of the Budget Circular No. A-8, Revised, this Agency be relieved of the responsibility of collecting payments which may not have been made in accordance with your conclusion."

The referred-to Bureau of the Budget Circular No. A-8 defines the word "family" as meaning the mother, father, children, stepchildren or sister of an employee "living with the employee at the foreign

post," and specifically states (see paragraphs 4 and 13 therein) that the quarters and cost of living allowances prescribed in appendices II and III thereof are based upon the "family status" of an employee, as defined above. It has been informally ascertained from the Bureau of the Budget that the word "wife" was inadvertently omitted from the definition of "family" in said circular and that the increased allowances for a "married" employee in appendix II and for an employee "with dependents" in appendix III were established for an employee who had a wife, mother, father, children, stepchildren, or sister living with him at his foreign post of duty.

Since it appears that the quarters allowances are authorized to be paid in order to compensate an employee for expenses incurred by him for quarters at his foreign post of duty because of the fact that he is not provided free rent, heat, fuel, and light in Government-owned or rented buildings, and that the cost of living allowance is payable in order to equalize the difference between costs at the foreign post and Washington, D. C., of subsistence, services, commodities, and other living expenses, except quarters (including heat, fuel, and light), the increased allowances for a married employee may be regarded as payable to such an employee only if his wife or other dependents be living with him at his foreign post of duty. See 27 Comp. Gen. 124, and 26 Comp. Gen. 731.

As the meaning of the regulation appears confusing by reason of the fact that the word "wife" was omitted from the definition of "family" in the circular, you are advised that no question will be raised in the audit with respect to payments heretofore made upon the basis of your office's prior interpretation of said regulation.

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DECISION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

B-70827 (UNPUBLISHED) November 10, 1947

Newly appointed employees who, before reporting to their first permanent duty post, perform actual services other than training and indoctrination at another post may be paid travelling expenses from that other post to the first post of permanent assignment.

COMPTROLLER GENERAL WARREN TO THE DIRECTOR OF CENTRAL INTELLIGENCE

Reference is made to your letter of October 31, 1947, requesting a decision as to whether, under the circumstances hereinafter set forth, Washington, D. C., properly may be considered as the first post of duty for two employees of your Agency.

It appears the first employee named in your letter received notice of his appointment in the Central Intelligence Agency on May 21, 1947, and traveled to Washington, D. C., at his own expense where he entered on duty the following day, May 22, 1947. At the time of the employee's appointment, it was anticipated that he eventually would be assigned to duty in [redacted] 25X1A 25X1A6a when that office was activated, but that the date of such activation was indefinite because of the difficulty in securing office space. However, it was determined that the employee's services would be of great value to the Washington office 25X1A6a until such time as the office in [redacted] was established. 25X1A6a Thereafter, office space was secured and the employee's official station was transferred from Washington to [redacted] and expenses of transportation authorized at Government expense. The transfer order was issued on June 9, 1947, but the transfer was not effective 25X1A6a until the employee's arrival in [redacted] on June 25, 1947.

The facts with respect to the second employee named in your letter are similar to those of the first employee in that the second 25X1A6a employee was appointed in contemplation of ultimate duty in [redacted] but paid his own traveling expenses from Maxwell Field, Florida, to Washington, D. C., where he entered on duty on June 16, 1947, for indoctrination, until office space was secured in [redacted] 25X1A6a His 25X1A6a transfer to [redacted] from Washington was effected on July 16, 1947, pursuant to transfer orders dated July 11, 1947, authorizing travel at Government expense.

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It is indicated that the official stations of both employees were designated as Washington, D.C., in the first instance, primarily because of the difficulty in anticipating how long the employees would be required to remain in Washington prior to the actual establishment of offices in [redacted], and, also, because of the additional cost involved if the employees were to be considered in a temporary duty status and allowed per diem in lieu of subsistence while in Washington. 25X1A6a

It is well established that civilian employees are required to place themselves at their first duty station at their own expense in the absence of express statutory authority for the payment of said expenses by the Government. 7 Comp. Gen. 203. Also, it has been held that an order directing an employee to Washington or to a field office for preliminary training before permanent assignment does not establish the first duty station of the employee at the place of training and that he is required to bear his own expenses in reporting to the place finally fixed as his post of duty. 10 Comp. Gen. 415; 20 id. 820. However, with respect to the performance of actual services in addition to training it was held in 21 Comp. Gen. 7, as follows (quoting from the syllabus):

> "Newly appointed employees who are first assigned for training and duty at Washington, D.C., or elsewhere, may be paid their traveling expenses from such place of training and duty to subsequently assigned duty station. 10 Comp. Gen. 222, involving the performance of temporary duty before reporting to first duty station, distinguished."

It informally has been ascertained from your office that the employees involved in the instant case actually performed services other than duties connected with training or indoctrination during the periods they were assigned to Washington. In view thereof, and as it was not known at the time of their appointments just when the employees would be assigned to [redacted] for permanent duty the rule stated in 21 Comp. Gen. 7, supra, is deemed applicable to said employees and Washington, D.C., is to be regarded as their first post of duty. 25X1A6a

In that view of the matter your basic question as to whether payment may be made to the travelers and the carriers for expenses incurred in traveling from Washington,D.C., to [redacted], respectively, under transfer letters and orders, as issued, is answered in the affirmative thus rendering unnecessary any answer to the other question propounded. 25X1A6a

SECRET

GENERAL COUNSEL'S OPINION NUMBER 54-8, DATED 16 AUGUST 1954

Staff agents are entitled only to the pay and allowances which accrue to Government employees. They may not retain the allowances paid by their cover organizations.

TO EXECUTIVE OFFICER, DD/P

1. This will acknowledge receipt of your request for my views on the legal aspects of the claim by IO Division that Mr. N. be allowed to retain the allowances paid to him by his cover organization.

2. Mr. N. is a staff agent and as such is entitled to the normal emoluments which accrue to Government employees. He is also subject to the normal limitations of such service. I know of no Federal statute or rule of law which will allow payment of subsistence allowances to Federal employees assigned [redacted] The allowances listed by Mr. N. in his memorandum of April 28, 1953, to Admiral S., are of a type permitted by law to be paid by virtue of overseas service, and similar allowances are authorized by law to be paid by CIA for such service. As such, therefore, they are inapplicable to the present case. 25X1A FOIAb5

[redacted]

4. The IO Division memorandum reports Mr. N.'s feeling that his position is legally justified on the ground that he was promised the allowance by responsible officials of the Agency in advance of his

employment and that formal approval of the allowances by P. was made with the concurrence of the responsible Agency representative. Such a statement, while entitled to sympathetic consideration, cannot be made the legal basis for retention of an erroneous payment. It is a settled principle that the United States is not bound or estopped by an erroneous payment made by its officers, with or without jurisdiction, and whether made under mistake of fact or of law. The application of this principle requires the United States, without regard to the circumstances surrounding the erroneous payment, to attempt to recover it from its recipient.

5. In view of the above, it is my opinion that the payments in question were made contrary to law. In view of the fact that there is no outside audit of unvouchered funds, it is true that the DCI has the power to authorize the write off of the obligation of Mr. N. to repay. If the payments were brought to light and were reviewed by an office such as the General Accounting Office, collection efforts could still be instituted against Mr. N., and, in my opinion, would be successful.

[redacted]

LAWRENCE R. HOUSTON
General Counsel

FOIAb3b

CONFIDENTIAL

GENERAL COUNSEL'S OPINION NUMBER 54-9, DATED 9 SEPTEMBER 1954

There is no statutory requirement of medical office approval prior to hospitalization and medical treatment of an employee.

Agency authority to pay the costs of medical treatment continues only while the employee is assigned to a permanent duty station in a foreign country.

TO THE MEDICAL OFFICE

1. Reference is made to your request for comments on paragraphs 3a,b and c of your internal Medical Office Memorandum, which are set forth below. The referenced paragraphs state:

"3 . . . . this claim raises the following points which should be settled as a matter of policy . . . FOIAb5

[redacted]

"b. If the Agency is to be responsible for such expenses, it seems to me that some degree of control over where the individual is to be hospitalized and who is to treat him should be exercised by the Medical Office.

"c. In cases where prolonged medical care will be required, such as terminal carcinoma, tuberculosis, and mental illness, a definite policy should be laid down as to the duration of Agency responsibility." FOIAb5

[redacted]

CONFIDENTIAL

FOIAb5

3. As to question b, where security and operational considerations are involved, it would appear to be appropriate for the Agency to control hospitalization and even selection of attending physicians, to the maximum extent possible. It would appear further to be a proper responsibility of the Medical Office to keep overseas installations currently informed as to available medical facilities and recommended physicians and surgeons for the given area. However, there is nothing contained in the legislative authority that would require approval of the Medical Office or notice to the Agency (when not in violation of security or operational requirements) prior to hospitalization and medical treatment. Reimbursement for proper medical and hospital expenses may be made in accordance with Agency

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legislation, where the first notice of the illness or injury to the Agency is with respect to a fait accompli.

. . .

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[redacted]

8. With respect to the employee who incurs an illness or injury which does result in such a disability as will impair his ability to continue in the same job, if he continues in an assignment at a permanent-duty station overseas, continuing costs for hospital treatment of the illness or injury may be reimbursed. However, if he is transferred to the United States, upon reporting for duty at the place of assignment in the United States, either part-time, or full-time, costs incurred after reporting for duty may not be reimbursed. The same would be true of an employee who, upon reporting for duty in the United States after an assignment overseas, was found to be suffering from an illness or injury that might be clinically established to have been "incurred" overseas.

9. With respect to the findings above relating to termination of

benefits upon reporting to duty in the United States or onset of an illness that may be clinically traceable to overseas duty, the finding that they are not authorized by our Act does not equate to the current administration of the medical benefits granted the Department of State by the Foreign Service Act. Foreign Service Regulations will allow payment for reoccurrence while on assignment in the United States of an illness incurred overseas and for onset of illness in the United States that may be determined clinically to have been incurred overseas. However, the Foreign Service Act and the Central Intelligence Agency Act are basically different in this respect. The Foreign Service Act applies to Foreign Service Personnel wherever stationed and contains the pertinent single criterion that the illness or injury be incurred in the line of duty while the person is assigned abroad. Our Act requires not only that the illness or injury be incurred in line of duty while the person is assigned abroad, but also, that the personal benefits granted by our Act apply only "with respect to its officers and employees assigned to permanent-duty stations outside the continental United States, its territories, and possessions."

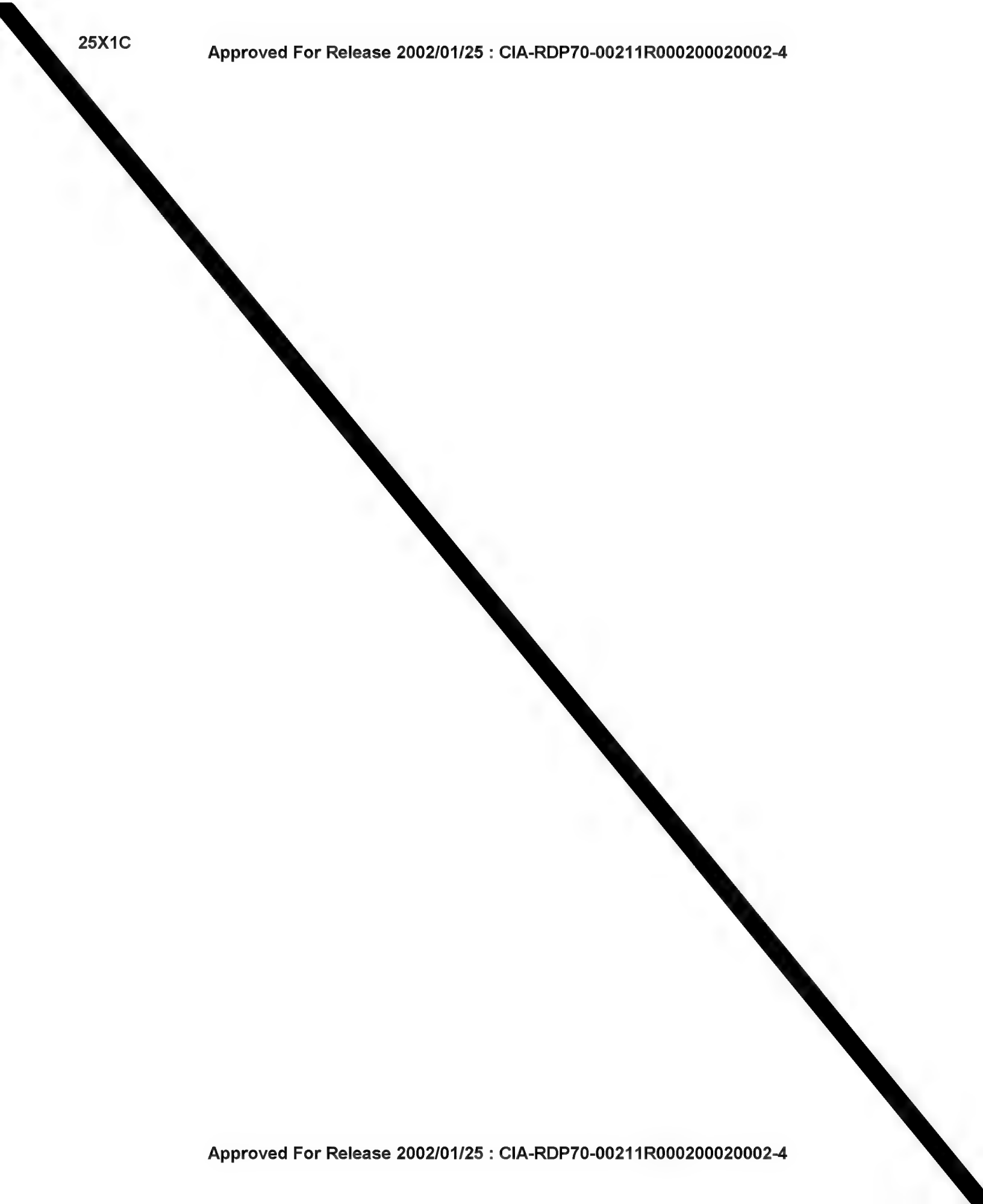
10. It is found, therefore, that Agency authority and responsibility to pay the costs of hospital treatment in proper cases of illness or injury of employees assigned to permanent-duty stations outside the continental United States, its territories, and possessions, continues as long as the employee is assigned to such overseas post. It terminates at such time as (1), he reports for duty at a post within the United States, its territories or possessions; or (2), he is retired for disability; or (3), he is separated from service.

11. It is deemed advisable to make mention of the fact that operational and security considerations oftentimes condition the place of hospitalization. Such considerations, however, do not serve to enlarge the subject personal benefits or amend the determinations set forth above. In such instances the travel to the place of hospitalization may be authorized as operational travel. Any personal benefit that is (or is not) derived from such travel and hospitalization is incidental. The place of hospitalization is required in the interest of security of operations.

[redacted]

LAWRENCE R. HOUSTON
General Counsel

FOIAb3b



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The schedule set forth therein provides that each employee will be insured for a sum equal to his annual compensation raised to the next higher multiple of $1,000. No authority is provided for the purchase of any greater or lesser amount of insurance. In other words, if the annual compensation is greater than, let us say, $7,000, but not greater than $8,000, the amount of group life insurance shall be $8,000 and the amount of group accidental death and dismemberment insurance shall be $8,000.

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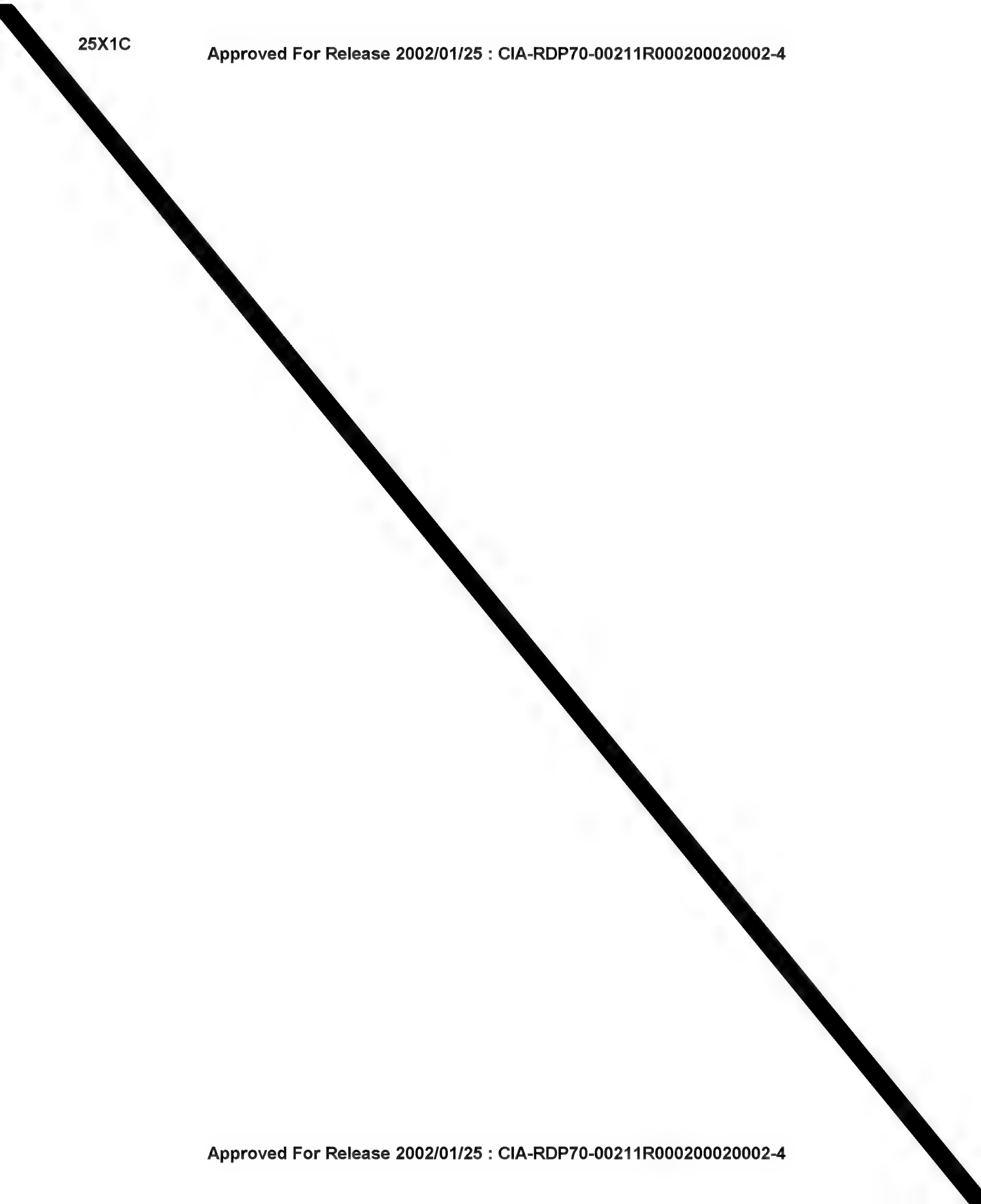

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GENERAL COUNSEL'S OPINION NUMBER 56-2, DATED 18 APRIL 1956

The Home Service Transfer Allowance is payable upon PCS transfer to the United States if certain requirements established by law and regulations are met.

TO THE CHIEF, PAYROLL AND TRAVEL BRANCH, FINANCE DIVISION

1. Your memorandum of 27 March 1956 requests answers to certain questions which have arisen in regard to home service transfer allowances. It appears from the questions asked that there may be some misunderstanding as to the type of transfer which makes an individual eligible for the home service transfer allowances. Two of the questions indicate a belief that such allowances are available on TDY transfer. Such is not the case. The Foreign Service Act amendment authorizing such allowances permits their payment whenever "extraordinary and necessary expenses, not otherwise compensated for, are incurred . . . incident to the establishment of his residence at any post of assignment abroad or at a post of assignment in the continental United States between assignments to posts abroad." The language of the statute authorizing the allowances for expenses incident to establishment of residence clearly refers to PCS trans-

[redacted]

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2. Any question you may have had in regard to the eligibility for home service transfer allowances upon TDY assignment is answered in accordance with the previous paragraph. Your other questions are rephrased where necessary and answered accordingly. Those questions and the answers are as follows:

A. Question: Is an individual assigned PCS to Headquarters and placed under a medical "hold" eligible for home service transfer allowances, assuming that the medical action appears to be a temporary one and that the individual will eventually be eligible for reassignment?

Answer: Such an individual is eligible for home service transfer allowances provided the procedures of [redacted] paragraph 4 are complied with, and it is clear that the individual should be able to return to an overseas assignment.

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B. Question: Would the answer to A be the same if the medical hold was such as to preclude forever the reassignment of the individual to an overseas post?

Answer: No. The home service transfer allowances are payable only upon the understanding that upon completion of the present assignment the individual will return to an overseas post. When such return is clearly not contemplated the allowance cannot be paid.

C. Question: What rights does an individual have to home service transfer allowances if he is returned TDY but his status is later changed to PCS?

Answer: Neither the Agency nor Standardized Regulations cover this point specifically. Payment of home service transfer allowances is not mandatory and the standards to be applied when not set forth in Standardized Regulations are within the discretion of the Agency. It should be borne in mind that the allowances are designed to cover the unusual expenses necessarily incident to the establishment of residence upon PCS transfer. If it appears that these expenses must be incurred and are not otherwise reimbursed, it should not matter that the individual for a period prior to his assignment PCS has been at the same post in a TDY status.

D. Question: What is the responsibility of the individual to refund allowances where he was originally under a temporary hold but within the first six months after return the medical hold became permanent?

Answer: Except in cases of voluntary separation or retirement within six months of payment of home service transfer allowances there is no requirement that they be refunded. If the employee has complied in good faith

with the procedures established in [redacted] he should not be required to refund the allowances solely because at a later date it is discovered that his intended reassignment to an overseas post has become impossible.

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[redacted]

LAWRENCE R. HOUSTON
General Counsel

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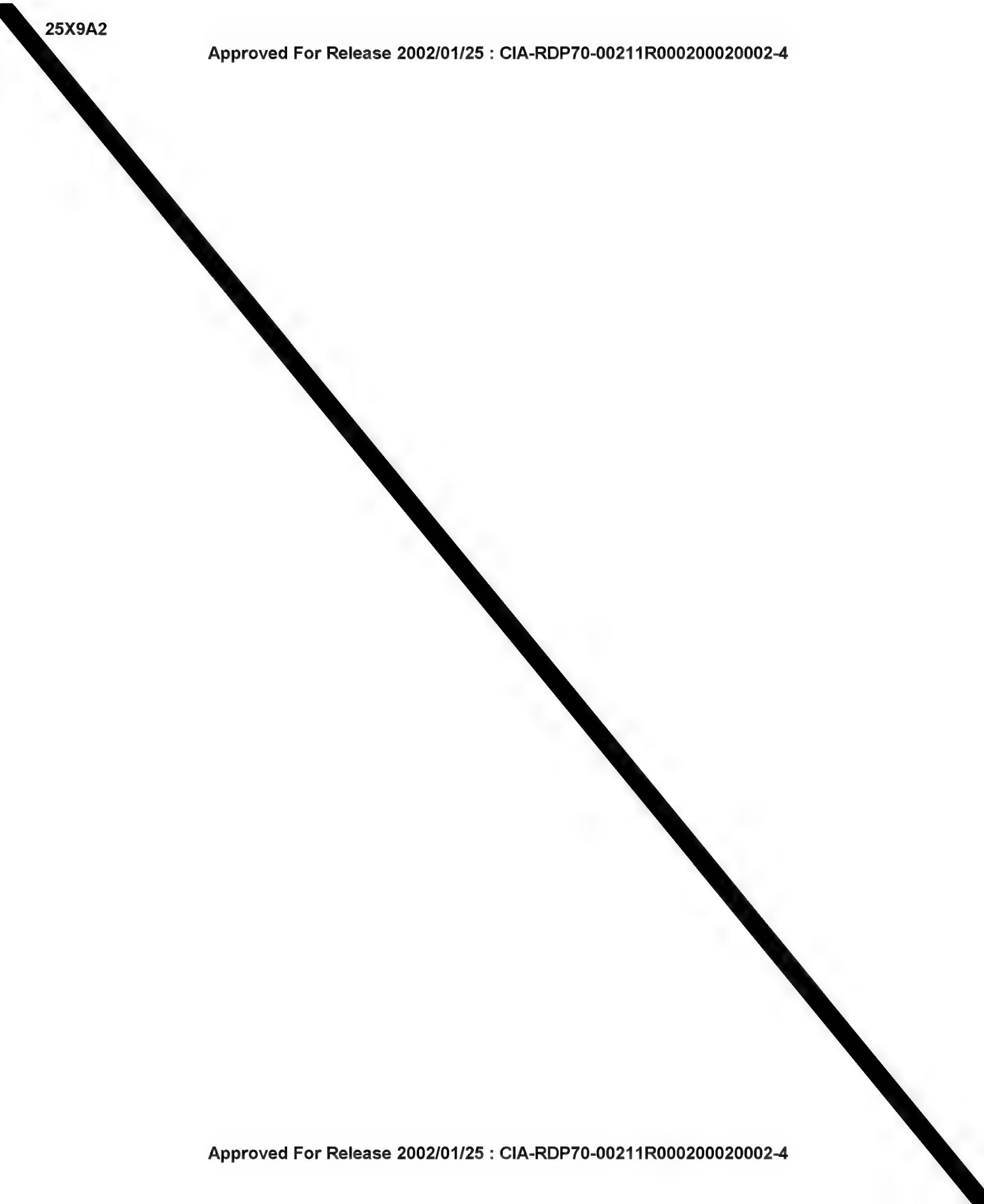

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5. The expense here is one of that large category which has always been considered personal to the employee insofar as it is related to personal possessions for private use, and while our Government may exert its efforts to obtain a waiver of the levy, it has not seen fit to appropriate public monies to meet the expense.

6. Since the Government has never recognized an obligation in this situation, we do not believe that the Agency should reimburse the employee for the tax. Where there is a clear operational need for the item, however, and it has a semiofficial identity (i.e., automobile), a pro rata apportionment of the expense could be justified to the extent of official use, and partial reimbursement would be warranted.

[redacted]

LAWRENCE R. HOUSTON
General Counsel

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GENERAL COUNSEL'S OPINION NUMBER 52-3, DATED 10 APRIL 1952

Agency personnel may be reimbursed only for expenses for which they would be reimbursed if employed in any other Government agency except where operational or security requirements peculiar to the Agency require them to incur certain expenses.

TO CHIEF, P&T/OPC

1. A memorandum dated 25 February 1952, poses the general problem of the policy which the Agency should follow in reimbursing or granting special allowances to CIA personnel who incur expenses because of the security or operational requirements of this Agency. The memorandum then cites three specific situations involving this problem and concludes by recommending that the CFR's be amended to cover these situations.

2. Since the problem is a general one, the basic principles applicable to it will be discussed first, and these principles will be applied to specific situations later.

3. It is often assumed that it is the general policy of this Agency to reimburse its personnel for any special expenses which they may incur in performing their duties for this Agency. A more correct statement would be that generally CIA personnel are reimbursed only for those expenses for which they would be reimbursed if they were employed by any other department or agency of the Government, except that, where operational or security requirements peculiar to this Agency require an employee to incur expenses, he may be reimbursed.

4. A legal analysis of the latter statement may be made as follows:

a. Generally, Government funds may be expended only in payment of Government obligations.

b. Certain expenses of Government employees, such as travel, etc., are by specific statute made obligations of the Government and are therefore reimbursable expenses.

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[redacted]

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[redacted]

5. Applying the above principles to certain specific situations, we find that:

a. An employee ordered abroad is paid travel and transportation expenses since by specific statute such expenses are made obligations of the Government. However, foreign customs duties levied on his personal effects are not reimbursable as they are not Government obligations and have not been made so by any statute. Generally, CIA personnel who may have to pay such foreign customs duties are in no different position from that of other Governmental employees since the expense was not incurred for reasons peculiar to this Agency.

b. An employee who because of an emergency operational requirement is suddenly ordered abroad is not reimbursed for any rent he may have to continue to pay in Washington although, were it not for the operational requirement, he would have been able to arrange for the sub-letting of his house. The reason for this is that emergency assignment overseas is not peculiar to this Agency, but is a normal hazard of Government service.

c. Until recently Government employees handling money, such as certifying officers, who were required by statute to be bonded, had to pay the premiums on their bonds out of their own pockets. The premiums were considered a personal obligation,

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a special relief bill through Congress. A CIA employee, however, cannot do so for security reasons. Under such circumstances and in an appropriate case, there is a legal basis for the DD/A to authorize reimbursement if the amount involved is under $2,500 (CFR 10.12), and for the Director to authorize reimbursement in any amount.

[redacted]

LAWRENCE R. HOUSTON
General Counsel

FOIAb3b

SECRET

GENERAL COUNSEL'S OPINION NUMBER 53-4, DATED 3 APRIL 1953

A comprehensive review of the Agency's statutory authority to pay for medical treatment, hospitalization and travel expenses connected with hospitalization of its employees.

TO THE ASSISTANT DIRECTOR (PERSONNEL)

1. Memoranda recommending treatment or reimbursement for treatment in the cases set forth in (a) through (g) below, together with comments of the Chief, Medical Staff indicate a need for comprehensive review of the statutory authority upon which [redacted] is founded. 25X1A A short summary of the fact situations in these cases is as follows:

(a) A staff employee assigned to a foreign post was evacuated to the United States with the concurrence of the Medical Office, where he underwent two operations for the removal of a brain tumor.

(b) A staff employee, while on TDY and home leave from overseas, was diagnosed as having a malignant tumor and was operated on at a hospital in the United States.

(c) A staff employee suffered an attack of coronary thrombosis and was hospitalized while stationed in a foreign country. Claim for reimbursement was made to the Bureau of Employees' Compensation for medical expenses approximating $400. The claim was denied on the ground that the claim is not reimbursable within the scope of the Federal Employees' Compensation Act.

(d) The dependent wife of the Chief of Station in a foreign country was forced to travel to another foreign country for medical treatment requiring hospitalization. Claim was made for cost of transportation and subsistence. Cost of medical expenses was not included.

(e) A staff employee, was hospitalized in a foreign country while on TDY from this headquarters, for strangulated ventral hernia. The Medical Office states that "there is no usual

EDITORIAL NOTE: Authorization of medical care for dependents and travel for hospitalization of dependents was provided the Department of State by an amendment to the Foreign Service Act of 1946 (P.L. 828, 84th Cong., 70 Stat. 704, approved July 28, 1956). The portions of this opinion referring to State Department authority are now obsolete insofar as that authority has been changed.

relationship between the strangulation of the hernia and the subject's employment at the time."

(f) A staff employee makes claim for reimbursement for treatments by his own physician in the United States, for illness diagnosed as infectious hepatitus, recurrent. The Medical Office notes that he suffered an initial episode of hepatitus on duty with this Agency overseas in late 1949 and early 1950, for which he was hospitalized at his foreign post.

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(g) A staff employee, was hospitalized in a foreign country for an appendectomy. She requests reimbursement for her medical expenses.

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[redacted] Title IX, Part E, of the "Foreign Service Act of 1946", Public Law 724, 79th Congress, dated August 13, 1946. It is there provided, under the subheading "Expenses of Treatment": FOIAb5

> "Section 941. The Secretary may, in the event of illness or injury requiring hospitalization of an officer or employee of the Service who is a citizen of the United States, not the result of vicious habits, intemperance, or misconduct on his part, incurred in the line of duty while such person is assigned abroad, pay for the cost of the treatment of such illness or injury at a suitable hospital or clinic."

(c) The general authority for the payment of medical expenses of all federal employees is contained in Federal Employees' Compensation Act, dated 7 September 1916, Public Law 267, 64th Congress, as amended, which is titled, "An Act to provide Compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes." It is there provided, in part:

> "Section 1. ...That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death."
>
> "Section 40. DEFINITIONS
>
> (g) The term "injury" includes, in addition to injury by accident, any disease proximately caused by the employment.
>
> (h) The term "compensation" includes the money allowance payable to an employee or his dependents and any other benefits paid for out of the compensation fund..."

"Section 7. OTHER PAYMENTS AND EXCLUSIVENESS OF REMEDY

(b) The liability of the United States or any of its instrumentalities under this Act or any extention thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute...."

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